IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36202

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 699**
	)	
Plaintiff-Respondent,	)	**Filed: November 25, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
CARL L. BENNINGTON,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Patrick H. Owen, District Judge.

Order denying motion to suppress evidence in DUI prosecution, affirmed.

Ellison M. Matthews of Matthews Law Offices, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

Carl L. Bennington appeals from the district court's denial of his motion to suppress. We affirm.

I.
FACTS AND PROCEDURE

A Boise police officer stopped Bennington's vehicle at around midnight on April 1, 2008, after observing an unusual driving pattern and a possible failure to properly signal a lane change. Bennington was subsequently arrested and charged with felony driving under the influence. Idaho Code §§ 18-8004, -8005(7).[1] He filed a motion to suppress the DUI evidentiary fruit of the traffic stop, contending that the stop of his vehicle was not supported by reasonable suspicion

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[1] Bennington was charged with felony DUI because of the existence of a prior felony DUI conviction within fifteen years. For clarity, after Bennington's offenses and by 2009 amendment to I.C. § 18-8005, this charging enhancement was moved from subsection (7) to subsection (9).

of an ongoing crime. After a hearing the district court denied the motion, concluding that the officer's observation of Bennington's vehicle repeatedly weaving within its lane of travel provided reasonable suspicion that Bennington was driving under the influence and that the traffic stop was therefore justified.[2]

Bennington conditionally pleaded guilty, reserving the right to appeal the denial of his motion. He filed a timely notice of appeal.

II.

STANDARDS OF REVIEW

The standard of review on a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

III.

ANALYSIS

Bennington contends that the DUI-related evidence must be excluded because the officer did not have the reasonable suspicion necessary to legally stop his vehicle. In *United States v. Arvizu*, 534 U.S. 266, 273 (2002), the United States Supreme Court stated:

> The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Because the "balance between the public interest and the individual's right to personal security," *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that

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[2] Based upon this disposition, the district court found it unnecessary to address the separate justification for the stop advanced by the State, namely whether the officer had reasonable suspicion, or alternatively probable cause, that Bennington committed the infraction of failing to properly signal lane changes in violation of I.C. § 49-808.

> criminal activity "'may be afoot,'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Terry*, *supra*, at 30, 88 S.Ct. 1868). See also *Cortez*, 449 U.S., at 417, 101 S.Ct. 690 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

Here, the officer testified that he followed closely behind Bennington's vehicle for about a mile, that he observed the vehicle "drifting off towards the curb [making] small jerking movements back to the middle of the lane, basically swerving within the lane," and that this occurred "four or five times." The officer further testified that he stopped Bennington's vehicle on suspicion of driving under the influence. The district court made findings of fact that the officer had indeed made these observations and concluded, as had the officer, that this unusual driving pattern provided reasonable suspicion to stop the vehicle for investigation of whether the driver was committing the crime of driving under the influence.

Bennington challenges the district court's holding in two ways. First, he asserts that repeatedly weaving within one's lane does not, as a matter of law, provide reasonable suspicion to stop a vehicle for investigation of DUI. Second, Bennington asserts that his driving pattern is readily explained as normal driving because the road upon which he was traveling was under construction. He asserts that "even motorists who are not impaired may have to take corrective actions to safely navigate through a construction zone." Although Bennington did not testify at the hearing, and thus did not testify that this was the cause of his weaving, he complains that the district court should have made these "reasonable inferences" in his favor. These arguments have no merit.

As stated by the Supreme Court in *Arvizu*, reasonable suspicion is not a "finely-tuned standard" subject to a "neat set of legal rules" *Arvizu*, 534 U.S. at 274. Instead:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. See, *e.g.*, *id.*, at 417-418, 101 S.Ct. 690. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." *Id.*, at 418, 101 S.Ct. 690. See also *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (reviewing court must give "due weight" to factual inferences drawn by resident judges and local law enforcement officers). Although an officer's reliance on a mere "'hunch'" is insufficient to justify a stop, *Terry*, *supra*, at 27, 88 S.Ct. 1868, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls

> considerably short of satisfying a preponderance of the evidence standard, *Sokolow*, *supra*, at 7, 109 S.Ct. 1581.

Arvizu, 534 U.S. 266, 273-274 (2002). Consistent with these standards, this Court has previously upheld lower courts' determinations that, sometimes along with other factors particular to those cases, weaving on the roadway provided reasonable suspicion to stop a vehicle for investigation of whether the driver was committing the crime of driving under the influence. *See State v. Flowers*, 131 Idaho 205, 953 P.2d 645 (Ct. App. 1998); *Atkinson*, 128 Idaho 559, 916 P.2d 1284; *State v. Waldie*, 126 Idaho 864, 893 P.2d 811 (Ct. App. 1995). Bennington does not mention these cases, much less distinguish them, and the instant case is no different. In addition, as succinctly stated by the United States Supreme Court, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277 (citing *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)). Finally, at a suppression hearing the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *Valdez-Molina*, 127 Idaho at 106, 897 P.2d at 997. Bennington makes no claim that the district court's factual determinations were not based on substantial evidence. Instead, he merely complains that the district court did not make the factual inferences that he wanted. This does not establish error.

The district court's order denying Bennington's motion to suppress is affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**